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No. 06-1127

Supreme Court, U.S.
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In The

Supreme Court of the United States

MEDIA SIX, INC. and
CHARLES ROARK,

Petitioners,

v.

JOAN ZIGLAR,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Virginia**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. MORRISON, JR.*
WILLIAMS, MORRISON, LIGHT
& MOREAU
317 Patton Street
Danville, Virginia 24541-1213
(434) 793-4912

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether publication of an accusation of criminal acts on the part of a Commonwealth's Attorney by a newspaper, whose employees admit that they had no evidence or facts upon which to base a belief that the accusations are true and; despite that, made no inquiry into the underlying facts, constitutes reckless indifference to truth or falsity.

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STATUTES INVOLVED

VIRGINIA CODE SECTIONS CITED

***Va. Code Ann.* § 8.01-401.3.**

A. In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

B. No expert or lay witness while testifying in a civil proceeding shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. However, in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law.

RULES INVOLVED

FEDERAL RULES OF EVIDENCE CITED

Rule 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experienced, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 704

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

FACTUAL BACKGROUND

Respondent asserts that the Factual Background provided by the Petitioner is incomplete in material details which are crucial to this case. The Factual Background is restated.

In November, 2001, one Zakee Tahlib wrote a letter to "Roark and Kip Wallace" in which, among other things he described himself as a "highest profile drug dealer," serving time on federal charges and in jail, awaiting trial on state charges. Tahlib accused the Commonwealth's Attorney, Ziglar, of prosecuting him for revenge and personal motives and suborning perjury from a witness, "Ramsey," later identified at trial as Ramzee Shareef, in furtherance of her scheme. Tahlib was charged with first degree murder and robbery in Virginia state court but gave the impression that the murder charge was one of capital murder.

The letter asserted that Tahlib had carried on a sexual affair with Ziglar's sister, whom he identified as Cathy Ziglar. He claimed that Joan Ziglar, the Plaintiff had threatened him if he did not end the affair. According

to Tahlib, Joan Ziglar had trumped up the charges and suborned perjury against him because he had refused to do so.

Roark, one of the two named defendants at the time of trial, was an employee of Media Six and editor of its tabloid newspaper under the name of the "Buzz." Roark and Wallace, another employee of Media Six, published the letter, essentially verbatim, although it was edited to remove the obscenities, with which it was liberally supplied and correct some spelling errors.

In Petitioners' statement of the Factual Background, they fail to provide the following information, available in the trial transcript which is a part of the record:

At trial, both Wallace and Roark admitted that at the time of publication they had no evidence upon which to base a belief that any of the accusations contained in the letter were true:

> Q Did you have any facts that would – you testified that you understood that Mr. Tahlib was claiming he was charged with capital murder and that Ms. Ziglar was using false evidence to try to convict him of capital murder; is that correct?
>
> A I read that –
>
> Q That's your understanding?
>
> A Yes, sir.
>
> . . . .
>
> Q Did you know of any facts that would support the claim by Mr. Tahlib that Ms. Ziglar

v[illegible]using false evidence in trying to convict Mr. Ta[illegible]b of capital murder?

A No, sir.

(Testimony of E. Wallace, Trial Trans., Vol. I, pp. 82-83)

Q At the time that you published this letter you had no evidence of any sort from anybody, place, or thing that supported Mr. Tahlib's charges did you? None?

A No, sir.

(Testimony of C. Roark, Trial Trans., Vol. III, pp. 82-83)

Q You have no evidence at all to support your claim to belief that the letter was true did you? You've testified that from past; isn't that true?

A Yes, sir.

(Testimony of C. Roark, Trial Trans., Vol. III, pg. 119)

Although he attempted to avoid answering the question, Roark admitted that at the time of publication he had no reason to question Ziglar's professionalism, ethics or honesty:

Q Mr. Roark, let's look at a page from your deposition. A page from your deposition taken November 4, 2003, by Mr. Lee Livingston who was my predecessor in this case, in which you were asked the question at page 27, did you specifically have any concerns about Joan Ziglar's professionalism, integrity or ethics when you published the charges?

Answer: No, sir.

Do you see that?

A Yes, sir.

Q Is that your testimony?

A Yes, sir.

. . .

Q Answer my question, were you telling the truth when you were asked did you specifically have any concerns about her professionalism, integrity, ethics, when you published the Tahlib charges?

No, sir.

Was that the truth? That's the question I want answered.

A In regard to this subject –

Q Answer my question, was that the truth?

A Yes, sir.

Q Yes or no?

A Yes, sir.

(Testimony of Charles Roark, Trial Trans., Vol. III, pp. 47-49)

He admitted that at the time that he received the letter that he did not know if Tahlib existed or was the author, (Testimony of C. Roark, Trial Trans., Vol. III, pp. 69-70) and that he did not know if Cathy Ziglar, the alleged sister, existed or if there had been an affair. (Testimony of C. Roark, Trial Trans., Vol. III, pg. 70) He admitted that neither he nor anyone at Media Six tried to find out. Finally, he admitted that he published the letter to

"create a controversy." (Testimony of C. Roark, Trial Trans., Vol. III, pp. 52-53)

Roark further admitted that he did not attempt to determine if there actually was a person named Cathy Ziglar. He claimed that he could not contact inmates at the jail, but admitted that inmates could call him and that Tahlib had never done so. (Testimony of C. Roark, Trial Trans., Vol. III, pg. 44) Likewise, although Tahlib claimed to be charged with capital murder, thus implying that Ziglar was attempting to carry out a judicial lynching, Roark did not attempt to determine the nature of the charge, although it was a public record. (Testimony of C. Roark, Trial Trans., Vol. III, pg. 71) At trial, he was still congratulating himself on having "saved" Tahlib's life.

Both parties presented expert witnesses on the factual nature of the accusations, as constituting crimes. Two of those witnesses, Corbett and Johnson testified for Ziglar. One, Smith, testified for Roark. Corbett and Johnson stated that the charges were false. (Testimony of A. Johnson, Trial Trans., Vol. I, pp. 149-150); (Testimony of C. Corbett, Trial Trans., Vol. I, pp. 99-100) Smith stated that he would put little credence in them. (Testimony of R. Smith, Trial Trans., Vol. II, pp. 196-197) All three stated unequivocally that Tahlib was not a reliable source and had no credibility. (Testimony of C. Corbett, Trial Trans., Vol. I, pp. 124-125; Testimony of A. Johnson, Trial Trans., Vol. I, pp. 159-162; Testimony of R. Smith, Trial Trans., Vol. II, pp. 202-203) In particular, Johnson, stated that he was Ziglar's assistant at the time and that he, not Ziglar had the primary responsibility for prosecuting Tahlib. (Testimony of Andrew Johnson, Trial Trans., Vol. I, pp. 152-153) Roark himself claimed that Tahlib was credible

because he had boasted of his status as a drug dealer, although no other witness held this opinion.

As a result of the accusations, Ziglar removed herself from the prosecution and a special prosecutor, Corbett, was appointed. Because Ramsey and other witnesses lacked credibility, he ultimately chose to prosecute Tahlib on only one charge and convicted him.

At trial, Ziglar presented an expert witness, Dr. Edward Wasserman on the editorial process. Dr. Wasserman testified about the steps that an editor would take in determining which letters to the editor will be published and how accusations of this magnitude against a public official would be handled by a newspaper.

Dr. Wasserman testified that the nature of the charges was of such gravity and magnitude that, if they could be supported, they would not be relegated to the letters page. The great public concern for such a matter would dictate that the charges would be front page news. (Testimony of E. Wasserman, Trial Trans., Vol. I, pp. 180-182) Dr. Wasserman also testified that from the point of view of an editor, a person already convicted of a felony and in jail awaiting trial on other charges was inherently suspect as a source when accusing the person prosecuting his case of criminal acts. (Testimony of E. Wasserman, Trial Trans., Vol. I, pp. 186, 196-199).

Roark did not object to the designation of Dr. Wasserman as an expert before trial. He did not object to Dr. Wasserman's testimony at trial, except that it was on the "ultimate issue" (Trial Trans., Vol. I, pp. 187-188) In his post trial motion, he argued that Dr. Wasserman should not have testified but did not identify any basis for excluding his testimony. No constitutional issue was raised

concerning Dr. Wasserman's testimony at trial or at any time thereafter and the Virginia courts never passed upon the federal issue now raised in the Petition for Certiorari.

Following entry of judgment, Roark filed a Petition for Appeal to the Virginia Supreme Court. When that was denied, he filed a Motion for a Rehearing which was also denied. Roark did not, in either Petition or Motion, challenge the admissibility of Dr. Wasserman's testimony on any grounds, constitutional or evidentiary.

REASONS FOR DENYING THE PETITION

I. The Defendants Admitted That They Had No Evidence Upon Which To Base Their Professed Belief That The Accusations In The Letter Were True. Consequently, Publishing Such An Attack Without Any Investigation Was Reckless Disregard For The Truth Or Falsity Of The Accusation Of Suborning Perjury.

Roark argues that this Court should grant certiorari but effectively would have it do so in a vacuum. This Court has repeatedly said that the extent of First Amendment protection to be extended to a publication where the subject is a public official or public figure will be established on a case by case basis. It has furthermore held that an appellate court must conduct a *de novo* review of the entire record. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Roark attempts to present this case as one in which the claim, verdict and judgment were based solely upon his failure to "thoroughly" investigate to determine the validity of the accusations of criminal conduct or the facts

upon which they were based. That is not the case and was not the evidence.

Roark makes no reference to the evidence presented at trial. He claims that he believed the accusations were true. But he fails to provide this Court any basis for such a belief. Roark's claims fly in the face of the evidence presented and his own admissions. He and Wallace, his employee, admitted at trial that at the time of publication, they did not know of any facts or evidence upon which to base a belief that the accusations were true.

Effectively, what Roark argues is that he has an unconditional right to publish accusations of criminal acts against an official, from any source, known or unknown, with no facts or evidence upon which to base a belief that the accusations are true, so long as he does so in the form of a "letter to the editor." To allow him anything less, he claims, would chill 1st Amendment rights for all the media. This Court has rejected such unlimited license in past decisions, beginning with. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

This Court has repeatedly noted that lies are not entitled to 1st Amendment protection. *E.g., Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). Roark's arguments not withstanding, it is clear that he published lies. Two witnesses with personal knowledge of the case, Corbett and Johnson, testified that the accusations were false. One, Johnson, testified that he had primary responsibility for Tahlib's case. He stated that he was personally present, with counsel for Ramsey, when he made the statements implicating Tahlib.

Roark and Wallace admitted at trial that they had no reason to believe the lies were true. Roark was not commenting on a matter of public interest or concern. He published an accusation by a felon who was attempting to derail his prosecution and he published it verbatim. In doing so, he was simply pursuing his admitted goal of creating controversy by whatever means were available to sell his product. This stands in stark contrast to the other cases decided by this Court.

In *New York Times Co. v. Sullivan, supra*, 260-261, the advertisement at issue involved matters which had received national attention and were of national concern, the suppression of black citizens and the denial of basic civil rights. The defendant newspaper was able to articulate a basis upon which it could believe that the contents of the advertisement were true. The agency that placed the ad provided a letter certifying that the persons allegedly signing it had given their permission to use their names. The author of the letter was known to the paper to be a reliable person, as were several of the persons who were listed as endorsers.

In *St. Amant v. Thompson,* 390 U.S. 727 (1968), the defendant had personal knowledge of the person making the accusations. The matter in question involved the alleged involvement of a candidate for public office with corrupt union officials. The source for the information had provided a sworn affidavit attesting to the truth of his statements. Other persons involved in the union controversy had made similar statements concerning the activities.

In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the publication was based upon a government report which addressed a claim of police brutality and violation of civil rights which had received national attention. The story was about a report of the Civil Rights Commission. This Court described the report as one of "a number of possible interpretations of a document that bristled with ambiguities." *Id.* at pg. 290.

However, in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989), this Court considered the publication of allegations of criminal conduct by a paper which bears some resemblance to this case. In that case, the Court stated that it was necessary to review the evidence when attempting to determine if the standard of *New York Times, supra* had been met. In *Connaughton*, this Court noted the evidence in the record from which a jury could find that the paper had reason to question the source's reliability and that it had deliberately avoided taking steps available to it to verify the accusations.

Ziglar submits that such evidence clearly exists in this case. In fact, this case is stronger than the facts in *Connaughton*.

In support of his argument, Roark has asserted that the fact that the accusations of the letter were false does not establish his awareness of falsity. In the abstract, this may be true. But Roark artfully avoids addressing the effect of his own admission, and Wallace's testimony, that they had nothing upon which to base a belief that the accusations were true and that they had no questions about Ziglar's honesty or ethics before Media Six published.

The fact that Roark finally admitted that at the time of publication he had no questions about Ziglar's honesty is an important point. The crux of a common law, criminal act is the *mens rea*, the evil intent. Honesty and *mens rea*, particularly in the setting of perjury, are mutually exclusive. If publication of accusations of the commission of crimes with no reason to believe in the existence of either criminal intent or criminal act is not reckless indifference to truth or falsity, then what is?

In additional support of his claim that he was justified in publishing the letter, Roark argues that prosecutors claim that felons testifying against felons are reliable. Therefore, he concludes, he should be permitted to assume that an attack by an admitted felon on a public official has enough facial credibility that he should be permitted to publish it even if he has no reason to believe it true and has made no effort to verify any of the alleged facts or accusations.

He makes the astonishing assertion that:

> . . . a convict, prior to trial has no motive to make false charges and, in fact every motive not lie, especially to the community at large. *Petition* at pg. 19

If this were true, then as Johnson testified, there would be little need for juries or criminal trials at all. (Testimony of A. Johnson, Trial Trans., Vol. I, pp. 160-161) The accused, having no motive to lie, would admit his guilt, express his remorse and the judge would then take the necessary actions to punish and reform the guilty person. However, the real world is not so neat and logical.

In this case, Corbett described the attempts by Tahlib to interfere with or prevent his prosecution by threats or other attempts to influence witnesses, including letters, as did Johnson. Smith, a witness called by Roark, made similar observations.

Notably, Tahlib was successful in preventing Ziglar and her assistants from continuing his prosecution by making the false accusations Roark published. This should be a matter of considerable concern. If Roark's arguments are accepted, then any person charged with a felony may disqualify the prosecutor simply by sending a "letter to the editor" accusing that prosecutor of crimes, which the "editor" or media outlet may publish with complete impunity.

Roark also asserts that the filing of a suit against him and his company for defamation in some way validates his supposed reliance on the believability of the letter. This is a circular argument that, if accepted, would prevent the filing of any suit for defamation, no matter how outrageous and false the accusations. Roark offers no authority for this assertion.

Ziglar submits that Roark and Media Six fail to offer any valid reason why the Petition should be granted. To hold that Roark and Media Six did not publish with reckless indifference, in the face of Roark's own testimony, is to effectively merge reckless indifference with actual knowledge of falsity. As Dr. Wasserman so succinctly put it, based upon what Roark admitted that he knew, the accusations constituted no more than "scribbling on the bathroom wall." (Testimony of E. Wasserman, Trial Trans., Vol. I, pg. 196)

II. The Issue Of Admissibility Of Expert Testimony As A Constitutional Matter Was Not Raised In State Court And Is Not Properly Before This Court. The Expert Testimony Provided Specialized Knowledge To The Jury And Was Admissible Under State And Federal Law.

For the first time, Roark presents the issue of the admissibility of testimony by Edward Wasserman as a matter of constitutional right. His only previous objection to admissibility was on the question of expert testimony on the "ultimate issue" (Trial Trans., Vol. I, pp. 187-188), an objection that has no basis in state, *Va. Code Ann.* § 8.01-401.3(B), or federal evidence law, *Fed.R.Evid.* Rule 704. *Fed.R.Evid.* Rule 702.

Wasserman was identified and his testimony summarized, as a matter of Virginia procedure, almost two months before trial. Defendants did not object to the designation. Their only trial objection is as described above.

Neither the Petition for Appeal nor the Petition for a Rehearing to the Virginia Supreme Court raised any issue of Dr. Wasserman's testimony on constitutional or other grounds. In fact, neither Petition even mentioned Dr. Wasserman or his testimony. Consequently, the issue presented to this Court was never raised or considered by any state court. Ziglar submits that on that ground alone certiorari on this issue should be refused, *cf., Orr v. Orr*, 440 U.S. 268 (1979).

But, even if this Court were to consider the issue, Roark fails to make a convincing case. He asserts that use of Dr. Wasserman's testimony is contrary to the jurisprudence of this Court. But, he fails to cite any decisions of this Court that would support that assertion.

Threshold admissibility of expert testimony in Virginia is governed by a similar standard to that in federal courts. The question is whether the witness has specialized knowledge that would assist a jury in understanding the evidence. *Compare Va. Code Ann.* § 8.01-401.3(A) *and Fed.R.Evid.* Rule 702. No objection was raised to Dr. Wasserman's qualification as an expert.

Ziglar submits that the editorial process, determining which stories or letters to present and the manner in which to do so, is specialized and not within the common knowledge of a juror. Dr. Wasserman was presented both on the issue of the credibility of an author such as Tahlib and issues such as how an editor, as opposed to a reporter, would have addressed the issue. Notably, Dr. Wasserman raised one of the same issues as the witness Smith, the need to identify the actual author of the letter, to see that it was not phony. (Testimony of E. Wasserman, Trial Trans., Vol. I, pg. 179) Dr. Wasserman was aware, before he testified, of admissions by Roark and Wallace that they had no facts or evidence upon which to base a belief that the allegations of the letter were true, and the admission by Roark that he had no reason to question her honesty.

Dr. Wasserman did not testify about negligence. The term was never used during his testimony. He did testify that Media Six and Roark were reckless.

Ziglar submits that both by reason of failure to make a timely objection and the actual nature of his testimony, that Dr. Wasserman's evidence is not grounds upon which to grant the Petition, and that it should not be considered if the Petition is granted.

III. The Accusations, Once Proven, Constituted Defamation *Per Se* For Which Damages Were Recoverable. Plaintiff And Her Witnesses Testified To The Effect Of The Accusations Upon Her. Defendants Did Not Produce Any Contrary Evidence.

The final argument made by Roark is that the damage award was improper and that it conflicted with Ziglar's theory of the case. Virginia law is clear that in cases of defamation *per se*, damages are recoverable without proof of financial loss. *Tronfeld v. Nationwide Mutual Ins. Co.*, 272 Va. 709, 636 S.E.2d 447 (2006). Accusations of criminal acts are defamation *per se* in Virginia. *Shupe v. Rose's Stores*, 213 Va. 374, 192 S.E.2d 766 (1972)

Ziglar testified, as did Johnson, as to her humiliation and embarrassment. Roark offered nothing in contradiction. The argument presented to this Court on the issue of damages is circular. If the charges are false then there is no injury, if the charges are true then there is still no injury.

Gertz, supra, does not stand for the proposition for which Defendants cite it. This Court did not hold that damages may only be recovered for actual injury. It did hold that if the proof of defamation does not meet the standard of *New York Times, supra*, that only actual damages may be recovered. Since the issue here is whether the *New York Times* standard has been met, the argument makes no difference. If Ziglar proved her case to the standards set by this Court, sufficient to sustain a jury verdict, then she is entitled to damages. If she did not meet that burden of proof, then the entire issue of damages is never reached.

In any event, the amount of damages awarded, $75,000, is not a large amount and does not evidence passion or prejudice on the part of the jury that heard the case. The issue certainly does not rise to the level of a constitutional issue under the decisions of this Court.

CONCLUSION

For the foregoing reasons, Ziglar submits that the Petition for Certiorari should be denied.

Respectfully submitted,

Joan Ziglar

By Counsel

ROBERT L. MORRISON, JR. *
MARK T. WILLIAMS
WILLIAMS, MORRISON, LIGHT & MOREAU
317 Patton Street
Danville, VA 24541
434 793 4912 Phone
434 792 6110 Fax

**Counsel of Record*